NO.164.

Supreme Court of the United States.

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

I.

Not being advised by the rules of the court that more than one set of briefs can be filed on behalf of the appellants or appellee in this case, I had thought the printed argument concluded. However, I have been served with a reply brief for the appellants and do not think it just to my client to allow the same to pass unnoticed, especially as it makes statements which are thoroughly inconsistent with my previous statement and the record in this case.

In this reply brief counsel for the appellants state that I have made no effort to controvert his argument as to the nature of Brown's title. I did not think it necessary, nor do I now think it necessary, to make a diagram to show that the legal effect of the third proposition in my original brief on the merits of the case, answering the brief of the appellants, is that the title that Brown acquired, through the proceedings of the Superior Court of Cincinnati, was free from the term, covenant or condition of the lease, whichever it may be, entitling the lessors, the appellants, to forfeit by reason of a sale in this proceeding. That is the legal effect of the proceedings in the Superior Court.

Again, the fact is not that the lease was sold subject to the terms, covenants and conditions of the lease, as claimed by the appellants, but as shown by the original order of sale (top of

Record 15) the property—to-wit, the leasehold estate—was sold "at public auction," and I contend that when it was sold under such conditions, there being no reservation, either directly or indirectly, as to the right of forfeiture through a future sale, that the legal effect of such proceedings was to sell the property free from the right of forfeiture by reason of resale in the present proceeding.

It is immaterial what the lessors especially prayed for in their petition. The fact is, what was done under that petition or proceeding? No copy of the petition in the Superior Court is contained in the record, as it should have been had the case been brought properly to this court to be considered fully on its merits. As a matter of fact, the petition is one of the exhibits that was not printed or filed in the proceeding herein by the appellants and about which I have spoken. Not only is it a fact that the order to sell was made without any restriction, but the legal effect is that when it is sold without any restriction "at public auction," which means without limit or reserve, that it was sold free from the right of forfeiture notwithstanding certain other terms in the lease, as to its duration and the amount of rent to be paid, ran with the land.

Further, no exception was taken to this order of sale as to its form by the lessors. If they had desired to restrict the sale, as our authorities under proposition third in our former brief show, it should have been set forth in the order wherein the sale was made that the purchaser must be a party who would be approved by the landlord. There is no inconsistency in the order or decree made in the Superior Court nor in its construction to hold that the legal effect of such an order of sale is to eliminate from the lease the provision for the right of forfeiture by reason of that sale through a legal process or an assignment, whichever it may be designated. The reply to this line of argument contained in the reply brief for the appellants is fully covered as to the nature of Brown's title by proposition third in my original brief.

The only reply needed to the reargument beginning on page four of the appellants' reply brief is to refer the court to our proposition third that the action in the Superior Court and the sale at "public auction" nullified the provision of forfeiture in the lease.

The line of reasoning contained in the third proposition on page eight of the reply brief of the appellants might be subject to consideration if it were based on any facts contained in the case. It is not based on any facts, nor are there any facts in this case to which the decisions in Illinois would have any relevancy.

Coming now to the consideration of the fourth and last con-

tention made in the reply brief, beginning on page nine, I desire to call the court's attention to a fact which seems to have escaped the mind of the counsel for appellants, that the lessors, the appellants, had knowledge of this proceeding to sell.

The agreed statement of facts on page nine shows "that the rents due and payable to the lessor (the appellants) on March 1, 1906, were paid to them by Fletcher R. Williams on March 6, 1906." Now, the agreed statement of facts shows that on March 5, 1906, being the day before the rent was paid the lessors, the service of the subpoena in these proceedings was made on all of the appellants with the exception of Emma G. Donaldson, and that she was served on March 9, 1906. This service on March 9th necessarily related back and showed that these proceedings were instituted against Emma G. Donaldson on March 1st, and that she received the rent on March 6th, five days after the proceedings were started against her, and there is no record that she ever returned the rent, but it is admitted that she received it, so that she is bound equally with the others as to the fact in the case. The attempt to distinguish Mrs. Donaldson, as to this proposition from the other tenants, is entitled to no consideration by reason of the fact that she took the rent after the proceedings were instituted, and that she has held the rent after the service on her of the subpoena in this proceeding, begun before she ever received the rent. The case cited, as to the question of notice to one co-tenant not binding the others, does not apply to the facts as disclosed in this case, for the fact is that all of them received the rent alike, and the question of agency of W. H. Gazlay is not a matter of concern because the rents were paid to all of them—that is, to the lessors as above quoted from the record.

However, the payment of the rent to one was a payment to all, was a full discharge as to all and bound all alike.

Freeman on Co-Tenancy, Sec. 177 and 178.

If a notice to quit by one co-tenant binds all, equally should the notice to one co-tenant of the intention to hold and sell the property bind all.

Alford vs. Vickery, 1 Car & M., 280.
Kindersley vs. Hughes, 7 Mees & W., 141.
Aster vs. Summersett, 1 B. & Ad., 140.

"A notice to one joint contractor is binding upon all."

Detlor vs. Holland, 57 O. S. 492.
Baker vs. Kellogg, 29 O. S. 663.

As this lease was an Ohio contract and the foregoing decisions are of the court of last resort in Ohio and not a lower court in Ohio, as the authority cited by opposing counsel, then

they should govern in the construction of the contract of lease and the continuing its existence.

And, equally, so does the act done by one co-tenant—to-wit, the receiving the rent—in the name and as the act of his companion become binding on the latter from and after ratification thereof, as was the fact in this case.

Freeman on Co-Tenancy, Sec. 188.

II.

THE COURT HAS NO JURISDICTION OF THIS CAUSE BY REASON OF THE PROCEEDINGS BEING TAKEN BY APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, WHEREAS THE APPELLANTS SHOULD HAVE REVIEWED THE CASE BY ERROR PROCEEDINGS.

We desire to bring to the attention of the court, though under the practice of this court it may not be necessary, the consideration of a jurisdictional question and the form of their review in this case.

The court has noticed on an examination of the record that they appealed this case from the district court to the circuit court of appeals. (Record 25.) Then they appealed to this court. I filed a motion to dismiss the appeal and assigned as one ground "no jurisdiction of the cause." This ground the court could consider of its own volition without argument.

In his brief on the motion and petition for writ of certiorari he argues that this is "a controversy arising in a bankruptcy proceeding" as distinguished from a mere "proceeding in bankruptcy," and that it is, therefore, appealable. Now, I have argued in my brief on behalf of the appellee that this is a "proceeding in bankruptcy" and if this proposition should be maintained, as contained in my original brief beginning on page six, then the proceeding from the district court to the circuit court of appeals was improperly taken and the matters should have been reviewed through the supervisory powers of the court of appeals under section 24 b, and not considered by an appeal.

Therefore, proposition second being maintained under the decisions of this court, the appeal was not, but a petition to review was, the proper proceeding from the district court to the circuit court of appeals, and this court should dismiss the entire proceeding.

First National Bank vs. Chicago T. & T. Co., 198 U. S. 280.

In re McMahon, 147 Fed. 684, and the authorities therein cited.

I respectfully submit that the whole proceedings should be dismissed. This is aside from the merits of the case, which the court need not consider.

PROVINCE M. POGUE,

Of Counsel for Appellee.

Saturday, February 15, 1908.

Office Supreme Court, U. S.
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JAMES H. MCKENNEY,
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Supreme Court of the United States

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Appellants,

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FLETCHER B. WILLIAMS, Trustee of Harry A. Brown, a Bankrupt,

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Brief of Appellants in Reply to Appellee.

OSCAR W. KUHN,

Counsel for Appellants.

The Cooke Typical Press, Law Printers, 300 Main Street, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES

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Appellants,

No. 164. *vs.*

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,

Appellee.

Brief of Appellants in Reply to Appellee.

In his brief, counsel for the trustee has made no effort to controvert the argument of counsel for the appellants that the title which Brown acquired in the leasehold estate under his purchase in the Superior Court proceedings was subject to all of the terms, covenants and conditions of the original lease between the lessors and Joseph D. Kueny, but has contented himself with the mere statement that Brown's title was free from the

terms, covenants and conditions of the original lease because the order of court, under which he purchased the leasehold estate, and which directed the receivers to sell it at public auction, did not in terms provide that it should be sold subject to those terms, covenants and conditions.

He advances no reason to show why the order, notwithstanding it did not direct the sale of the leasehold estate *free from* the terms, covenants and conditions of the lease, must nevertheless be construed in that way.

Nor is any authority cited by him in support of that view.

That such a claim is not tenable and, that the order of sale *must* be construed as directing the sale of the leasehold estate *subject to the terms, covenants and conditions of the lease*, the following reasons in addition to those already assigned in my first brief are submitted:

The lessors in their petition had asked specifically for the sale of the leasehold estate, subject to the terms, covenants and conditions of the lease, and for the appointment of receivers to make the sale in that way, and the right of the lessors to have it sold in that way had in nowise been questioned or controverted by any of the parties to the suit, so that the jurisdiction which the court took over the subject-matter of the suit was such only as was given to it by the petition; that is, a leasehold estate subject to all of the terms, covenants and conditions of the lease.

And since the receivers had been appointed immediately upon the filing of the petition, and by and with the consent of the defendant, Kueny, to take charge of the property brought into court by the petition, which included the leasehold estate with its terms, covenants and

conditions, and since no order had been made enlarging or in any way changing the nature and extent of the estate brought into court by the petition, it follows that when the order was taken by the receivers directing them to sell the leasehold estate (which order was only an interlocutory order and in no sense a final one), it referred to and could have referred only to the leasehold estate which the petition asked should be sold, and which the court had placed in the hands of the receivers pending the litigation, in accordance with the prayer of the petition, which was a leasehold estate subject to all of the terms, covenants and conditions of the lease.

Hence it is submitted that when Brown bought the leasehold estate from the receivers, it was the leasehold over which the court had acquired jurisdiction, viz: a leasehold estate *subject to all the terms, covenants and conditions of the lease* and not one that was free from them.

Moreover, even if the court had in express terms ordered the sale of the leasehold estate free from the terms, covenants and conditions of the lease, nevertheless the purchaser Brown would *not* have taken it free from those terms, covenants and conditions, because the order would have been void for want of jurisdiction in the court to make it, since, as above shown, the only subject-matter of which the court had jurisdiction was the leasehold estate *subject to* and not free from the terms, covenants and conditions of the lease.

But the order of court did *not* direct a sale of the leasehold estate *free from* the terms, covenants and conditions of the lease. Hence even if it be conceded that the order of sale was open to two constructions, one that the sale was to be made subject to and the other that it

was to be made free from those terms, covenants and conditions, then, as shown above, the construction that the sale was to be made subject to the terms, covenants and conditions of the lease *must* be the one adopted, because it is that construction only that will render the order legal and operative.

For when an order or decree of a court is susceptible of two constructions, one of which would make it legal and operative, while the other would render it illegal and void, a court *must* adopt the one that will make it legal and operative.

Armstrong v. *Grandin*, 39 O. S., 368.

It therefore follows that the sale was made subject to the terms, covenants and conditions of the lease, and was the only lawful way in which it could have been made, and that Brown so held the leasehold estate.

II.

Counsel for the trustee also maintains in his third proposition that the lessors have forever waived their right to forfeit the lease by accepting rent from Brown after he had taken possession under his purchase and by acquiescing in the improvements made by him upon the premises.

It is however submitted there neither was nor under the circumstances of this case could there have been a waiver by the lessors of their right to forfeit the lease by reason of their alleged acts and conduct with respect to the rent and the improvements for the following reasons:

1st. Since the lessors in their petition had asked for a sale of the leasehold estate subject to all of the terms, covenants and conditions of the lease and since no claim or adjudication had been made that the leasehold should be sold free from those terms, covenants and conditions, the lessors had the right to assume and believe that the sale was made in accordance with their request as set out in their petition, and that the purchaser took and was holding the title subject to the terms, covenants and conditions of the lease. Hence when they accepted rent from Brown and acquiesced in the improvements made upon the premises by him, they did so under the belief that he was holding the title subject to all of its terms, covenants and conditions, among which were the covenants to pay rent and to permit the making of improvements on the premises and under these circumstances they could have had no knowledge that by this conduct they were waiving any of their rights under the lease.

2d. It is nowhere shown by the evidence that the lessors had any notice or knowledge that Brown was holding or attempting to hold the title to the leasehold estate free from its terms, covenants and conditions or otherwise than subject to them; and since there can be no waiver of or acquiescence in a breach of condition without notice or knowledge of such breach on the part of the person against whom such waiver or acquiescence is asserted, the lessors have in no manner whatsoever waived or acquiesced in any breach even if it can be said there had been a breach.

Roe v. *Harrison*, 2 T. R., 425.
Crouch v. *Wabash R. R. Co.*, 22 Mo. App., 315.
18 Am. & Eng. Encyl. of Law (2d Ed.), 382.

It is therefore submitted that in no sense have the lessors waived their right to forfeit the lease by accepting rent from Brown, because their acceptance of it was without knowledge on their part of any prior breach as indeed there was none.

3d. However, assuming but not conceding that the law of waiver is correctly stated in the third proposition of counsel's brief, it has no application to the facts of this case. For, if the leasehold estate was sold not as requested by the lessors in their petition, but contrary to that written request, then they have nowhere consented *in writing* to such sale, and hence the rule in Dumpor's case and the cases following it are not in point here. For those cases hold that before a condition in a lease against alienation is dispensed with *forever*, the lessor must have consented to its alienation *in writing* and *without qualification*, and this was not done in this case and therefore on the facts of this case there could be no waiver.

Macher v. *Foundling Hospital*, 1 V. & B., 191.
Roe v. *Harrison*, 2 T. R., 425.
Richardson v. *Evans*, 3 Madd., 218.

4th. Further, even if the sale had been ordered made free from the terms, covenants and conditions of the lease, assuming that such sale were not void for want of jurisdiction in the court to make and that the lessors had had knowledge of that fact, since the lessors had not consented *in writing* to such sale, they would, because of their acceptance of rent with knowledge of such sale, simply have waived their right to forfeit the lease as against Brown only; but in case he assigned the lease or permitted his interest to be sold under legal process with-

out the written consent of the lessors, they would still have the right to forfeit the lease.

For if a lease upon the condition that it may be forfeited if assigned or sold on legal process without the written consent of the lessor, is nevertheless assigned or sold without such written consent, thereby constituting a breach of the condition and giving to the lessor the right to forfeit the lease, and the lessor with full knowledge of such breach accepts rent from the assignee or permits him to make valuable improvements upon the premises, he thereby waives his right to forfeit the lease because of the breach. But such waiver applies to that breach *only*, and implies no license for a subsequent breach. Hence if such assignee should assign without the written consent of the lessor, the lessor would still have the right to forfeit the lease.

Tiffany on Real Property, p. 179, Section 73.
Tiedeman on Real Property, Section 190, note.
Ambler v. *Woodbridge*, 9 Barn & C., 376; (5 Gray's Cases, 29).
Ireland v. *Nichols*, 46 N. Y., 413.
Alexander v. *Hodges*, 41 Mich., 691.
Crocker v. *Old South Soc.*, 106 Mass., 489.

It is therefore submitted that even if the sale had been ordered made free from the terms, covenants and conditions of the lease, the acceptance of rent and the acquiescence in the improvements would have constituted a waiver of the right to forfeit as against Brown *only* and not as against any purchaser from him or from anyone representing him, and hence the trustee can not sell the lease free from its terms, covenants and conditions.

The case of *Conger* v. *Duryea*, 90 N. Y., 599, cited by counsel for the trustee to support his contention that the

right to forfeit once waived is gone forever, is an authority the other way, and supports the contention of counsel for the appellants, for it holds that the condition in the lease, providing for its forfeiture in case of failure to pay taxes, is waived by the acceptance of rent with *full knowledge* of the breach of the condition, *for that time only*, but that upon a subsequent default in the payment of taxes the lessor would have the right to forfeit the lease. The statement of the court quoted by counsel for the trustee that a condition against assignment once dispensed with is gone forever is a quotation by the court from an earlier New York case. But the purpose for which it is quoted does not appear, for no attempt is made by the court to apply it to the facts of the case nor in support of the conclusion reached in the case, which as above stated was that the condition against forfeiture for non-payment of taxes had, by the acceptance of rent with knowledge of the forfeiture, been waived *for that time only*, but that upon the next default in the payment of taxes, the lease might be forfeited.

III.

Nowhere in his brief does counsel for the trustee answer the contention of counsel for appellants that a consent in writing to the assignment of a lease subject to all of its terms, covenants and conditions is valid, and that the assignee of such a lease takes it subject to those terms, covenants and conditions; but he seems to concede it. He, however, complains that only one case is cited by me to support that contention, viz: the case of *Kew* v. *Trainor*, 150 Ill., 150, and he attempts to distinguish the consent in that case from the consent in this case on the

ground that it was made to apply to one person only, while the consent in the case at bar was not so limited. But the consent in the Illinois case was made after the lessee had assigned the lease and of necessity must have been specific in its character, while the consent in the case at bar was made in advance of the sale and hence could not have been specific. But surely such a distinction is immaterial and can not affect the principle here contended for and which the Illinois case supports, viz., that a lease may be assigned or sold subject to all of its terms, covenants and conditions, and that when so assigned or sold is subject to those terms, covenants and conditions in the hands of the assignee or purchaser and it was not thought necessary to cite other cases on this subject.

There is however a later case in Illinois on this subject, which more definitely supports the principle here contended for, viz., the case of

Springer v. *The Chicago Real Estate Land & Title Co.*, 202 Ill., 17.

IV.

In his fourth proposition counsel for the trustee maintains that the lessors, by accepting rent from the *trustee* after he had elected to assume the lease, estopped themselves from forfeiting the lease in the event of a sale by the trustee.

That contention is completely refuted by the argument in the first brief of counsel for appellants wherein it is demonstrated that the trustee's title to the leasehold is subject to the same terms, covenants and conditions to which it was subject in Brown's hands, and it necessarily

follows that the acceptance of rent by the lessors from the trustee could not operate as an estoppel against them in favor of the trustee any more than the acceptance of rent from Brown could operate as an estoppel in his favor.

But, as shown above, with respect to Brown, it may again be pointed out that before the lessors can be held to have waived their right to forfeit the lease by accepting rent from the trustee after he had elected to assume the lease (even if it be conceded for the sake of the argument that such election might be a breach), it must be shown that the lessors had knowledge of the fact that the trustee had elected to assume the lease for the purpose of sale, and that with full knowledge of that fact they accepted rent from the trustee. But the record shows that the lessors had no knowledge of the trustee's purpose to assume the lease until they were served with notices of the suit to sell it. (See Record, at p. 9.)

Five of the lessors were served with such notices on March 5th, 1906, but the sixth one was not served until March 9th, 1906. On March 5th, 1906, W. H. Gazlay, one of the lessors who was authorized to receive rent, accepted rent from the trustee for the month of February, 1906, but whether it was before or after service of the notice of the suit on the five who were then served does not appear, and, in the absence of direct proof, it can not be assumed that rent was received after service of notices of the suit, especially when it is claimed that such acceptance of the rent constitutes a waiver of the right to forfeit the lease. (See receipt, p. 10 of Record.)

Assuming however that the rent was accepted by W. H. Gazlay after service of notice on the five lessors, there is no evidence to show that he had any authority to waive

the rights of the lessors in the lease, and in fact he had none.

But in any event the sixth lessor was not served with notice of the suit until March 9th, 1906, and no rent has been received since that date.

Hence since the lessors were tenants in common, notice to or knowledge acquired by one of them can not be charged or imputed to any of the others. And therefore the acceptance of rent by W. H. Gazlay even after he had knowledge that the trustee had elected to assume the lease and even if such assumption would have constituted a breach of the condition, would not operate as a waiver of the right to forfeit the lease, not only as against those *not* served but as against even those who were served.

Freeman on Co-tenancy and Partition, Section 171.

Perkins v. *Zumstein*, 4 Ohio Circuit Court, 371.

Judge Thompson's opinion in this case (Record, p. 23).

In final conclusion of the case it is therefore respectfully submitted that for the reasons as set out in both briefs of counsel for appellants, the lessors' right to forfeit the lease in the event of a sale by the trustee is still in full force and effect and that the judgments of the Circuit Court of Appeals and of the District Court holding otherwise are erroneous and should be reversed.

Respectfully submitted,

OSCAR W. KUHN,

Counsel for Appellants.

Cincinnati, Ohio, January 25th, 1908.